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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-627

RICHARD ANTHONY MAYES,

Petitioner,

—v.—

THE STATE OF TEXAS,

Respondent.

PETITION FOR CERTIORARI TO THE COUNTY CRIMINAL COURT AT LAW NO. 4 OF HARRIS COUNTY, THE STATE OF TEXAS

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The petitioner prays that a writ of certiorari issue to review the judgment of the County Criminal Court at Law No. 4 of Harris County, Texas, entered on June 11, 1973.

Opinions Below

No opinions were rendered by the court below.

Jurisdiction

The judgment of the court below was entered on June 11, 1973 (App. *infra*, p. 5a). By order of this Court an extension of time was granted to file this petition by October 9, 1973. There is no further right to appeal within the judicial system of the State of Texas.[1] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2).

[1] Vernon's Ann. Tex. Code Crim. Proc., Art. 4.03 (1966).

Ordinance Involved

Code of Ordinances, City of Houston, Sec. 28-42.4 (1972)

"It shall be unlawful for any person to appear on any public street, sidewalk, alley, or other public thoroughfare dressed with the designed intent to disguise his or her true sex as that of the opposite sex."

Questions Presented

1. Whether an ordinance which provides criminal penalties for disguising true sex by dressing as a member of the opposite sex violates the constitutionally protected right of privacy.

2. Whether the Eighth Amendment's prohibition against cruel and unusual punishment, as applied to the States through the Fourteenth Amendment, is violated by the conviction of petitioner solely because of his status as a transsexual.

Statement of the Case

On September 21, 1972, the Petitioner, Richard Anthony Mayes, appeared in Municipal Court No. 3 of the City of Houston for trial on the charge of disguising true sex. Petitioner had been arrested for the same crime of disguising true sex six times before, but was never brought to trial. Petitioner is a transsexual and was dressed as a woman in a pants suit outfit with a small typewritten sign reading "my body is male" pinned on the outside of his clothing. The case in court that day was dismissed, and

as Petitioner exited the Municipal Courts Building, he was again arrested by two vice squad officers and charged with disguising true sex.

On January 11, 1973, the case was tried in Municipal Court No. 3. Petitioner was found guilty (App. *infra*, p. 1a). On May 22, 1973, a trial *de novo* was heard by a jury in County Criminal Court at Law No. 4, a court of record.

At the trial the arresting officers testified that Petitioner was arrested because he was attired in women's clothing and makeup, and had long hair worn in a feminine style. They testified further that they knew and recognized Petitioner as a male who they saw habitually dressed in female attire. Petitioner testified that he was a woman and therefore dressed like one. Petitioner's doctor who is an endocrinologist testified that he diagnosed Petitioner to be a transsexual. He defined a transsexual to be a person who compulsively believes he or she belongs to the opposite sex, and is obsessed with the desire to have his or her sexual organs and appearance altered to conform to that of the opposite gender. He said that medical science has not found any organic cause or cure, other than sex reassignment surgery and hormone therapy for transsexualism, nor had psychotherapy been successful in altering the transsexual's identification with the other sex. He testified that, in following standard medical practice regarding transsexuals, he has been treating Petitioner with hormones and requiring that Petitioner live as a woman for a year and a half in preparation for sex reassignment surgery.

Petitioner was found guilty and was assessed a Fifty Dollar fine (App. *infra*, p. 2a). A motion for a new trial

was denied on June 11, 1973, and the judgment made final (App. *infra*, p. 5a). The federal constitutional claims presented by Petitioner were raised in the original trial court, and at the trial *de novo* by oral motion to dismiss after the State rested. Petitioner claimed that the ordinance violated the First, Fourth, Fifth, Eighth, Ninth, Tenth and Fourteenth Amendments.

I.

The case involves important questions of federal constitutional law which have not been but ought to be decided by this Court.

Although the Court has recently expanded and refined the definition of the right of privacy, the question remains whether that right extends to choice of personal appearance and sexual orientation. This case presents the Court with the opportunity to further define these two aspects of the right of privacy in a compelling context.

In *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), the Court defined the right of privacy as "the right of the individual . . . *to be free from unwarranted governmental intrusion* into matters . . . *fundamentally affecting a person* . . ." (at 453-454, emphasis added). And in *Roe* v. *Wade*, 410 U.S. 113 (1973), the Court further clarified the concept of privacy to mean that the individual is free from unwarranted governmental intrusion in his or her right to choose a course of action that fundamentally affects that person. The right to have an abortion in *Roe* was not derived from concerns about "privacy" in the narrow sense of protecting individuals from government snooping. The fault of the

abortion laws was not that they allowed the government to find out whether someone was *having* an abortion, but that they prevented an individual from choosing to have an abortion. *Roe* v. *Wade, supra.* The right to choose may be more accurately called the right of autonomy—or the right to make certain individual decisions free from unwarranted governmental intrusion or pressure. The question is whether the right to govern one's own personal appearance is a fundamental right as are the rights pertaining to marriage, family, procreation, abortion and contraception which were endorsed by this Court in previous decisions.

The Court has never defined the scope of the right of privacy with respect to the critically important and timely subject of sexual orientation. In *Roe* v. *Wade, supra,* at 153, the majority opinion examined the profound consequences to a woman's life if she were not allowed to decide whether or not to have an abortion, including psychological harm and the possibility that the woman will lead a "distressful life" because of the unwanted child. The Court indicated that the scope of the right of privacy may depend on how fundamentally the individual's life will be affected if he or she is denied the right.

Gender identity is the awareness of oneself as male or female. It is a basic component of personality that is extremely difficult to change. Pauly, "The Current Status of the Change of Sex Operation," 147 *J. Nervous Mental Disease* 460, 467 (1968). The transsexual has the gender identity opposite to that of his or her actual physical anatomy, and dressing in clothes of the opposite sex and appearing to

the world as a member of the opposite sex are essential parts of the transsexual's gender identity. *Id.* at 463.

Clearly, the transsexual's life would be profoundly affected if he or she were forced to change gender identity.[2]

The privacy issue in this case is clearly posed without the complication of having any countervailing state interest. The state interest in this case is easily met by alternative means. The state can prevent fraudulent impersonation of the opposite sex without suppressing fundamental personal liberties, *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). While it may be feared, for example, that a man dressed as a woman would use the restroom of the opposite sex, thereby creating a disturbance, Houston has an ordinance forbidding such use of restrooms. City of Houston, Code of Ordinances, Sec. 28-42.6. And the State of Texas outlaws the use of disguises to hide one's identity when committing criminal acts, Tex. Penal Code, Art. 450 and 454 a, c-f (Vernon's 1970). Thus, the state's interests are protected by other laws which do not trample on the constitutionally protected right of privacy.

Persons who dress as members of the opposite sex are subject to criminal sanctions in many jurisdictions and to frequent and harassing arrests in substantially all jurisdictions.[3] Indeed, in the instant case Petitioner was ar-

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[2] Medical science has not found any organic cause or cure, other than sex reassignment surgery and hormone therapy, for transsexualism nor has psychotherapy been successful in altering the transsexual's identification with the other sex. "Numerous attempts at therapy, including intensive psychoanalysis, hypnosis, aversion deconditioning, chemotherapy, and behavior therapy have been generally unsuccessful . . . " Pauly, *supra* at 462, 465.

[3] Cross-dressing ordinances exist in many cities, e.g., Columbus, Ohio (Columbus Municipal Code Sec. 2343.04), Saint Louis, Mis-

rested eight times for disguising true sex and was convicted only once.

II.

Petitioner's conviction violates the Eighth Amendment's prohibition against cruel and unusual punishment, as applied to the States through the Fourteenth Amendment, because it punishes him solely for his status as a transsexual.

An essential part of Petitioner's status as a transsexual is the compulsion to wear female clothing. The Houston ordinance makes criminal the involuntary and harmless manifestation of this status.

This Court should clarify the scope of the Eighth Amendment prohibition, as applied to the States, against punishment for involuntary status. See, *Robinson* v. *California*,

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souri (Sec. 788.010 of the Revised Code of 1960, Volume 2 of the City of St. Louis), Denver, Colorado (Rev. Municipal Code 823.16 (1951). According to a recent survey of many states there are state laws in Arizona, California, Colorado, Idaho, Nevada, Oklahoma, Oregon, Texas, Utah and Washington, which render cross-dressing criminal. Erickson Educational Foundation, Legal Aspects of Transsexualism, 3 (1971). *Legal Aspects of Male Transsexualism, in Transsexualism and Sex Reassignment* 417, 420 (R. Green & J. Money eds. 1969). Some courts have held that these laws are not applicable to transsexuals. See, *e.g.*, *Columbus* v. *Zanders*, 25 Ohio Misc. 144, 266 N.E.2d 602 (1920), in which the court found that a transsexual had an irresistable impulse to dress in the clothing of the opposite sex, and thus held that a transsexual could not be convicted of appearing in public in "dress not belonging to his or her sex." In *Garcia* v. *State*, 444 S.W.2d 847 (Tex. Crim. App. 1969), a state statute outlawing the public wearing of a disguise in such a way as to hide identity was held inapplicable to a male dressed in female clothing whose identity was well known to the arresting officer.

370 U.S. 660 (1962) and *Powell* v. *Texas*, 392 U.S. 514 (1968).

In *Robinson*, the Court held that the mere status of being a narcotics addict was constitutionally protected and could not be punished criminally. However, in *Powell*, the Court held that the active expression of a status, such as the act of an alcoholic being drunk in public, is not constitutionally protected. This case clearly raises for constitutional clarification the middle ground between *Robinson* and *Powell*. The Court in *Powell* found that there was nothing inherent in the condition or status of alcoholism that dictated that an alcoholic must compulsively be drunk in public. That is not true in the case of transsexuals. An essential part of their status is the compulsion to be considered publicly as members of the opposite sex, *Pauly, supra*. The question is whether the Eighth Amendment prohibits punishment of public expression of a status when an essential and substantially involuntary ingredient of the status is to harmlessly act out and express that status in public.

The appearance in public of a transsexual in the clothing of the opposite sex is the passive and essentially involuntary expression of a status and does not harm others. Petitioner has not committed any antisocial or disorderly acts nor has he accosted anyone or attempted in any way to impose himself on other persons. This may be distinguished from the state's interest in prohibiting public drunkenness where it can be argued that a drunk person may become violent. Petitioner is no more a criminal than a person who is "mentally ill, or a leper, or . . . afflicted with a venereal disease." *Robinson* v. *California, supra*, at 666.

We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action. *Robinson* v. *California, supra,* at 678 (concurring opinion).

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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